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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ~~1170~~ 80

THE CHOCTAW NATION OF INDIANS,
Petitioner,

vs.

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

WILLIAM G. STIGLER,
Counsel for Petitioner.

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No. 1170

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THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The Choctaw Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered against the Choctaw Nation of Indians in favor of the Chickasaw Nation on December 1, 1941.

Your petitioner respectfully shows:

I.

Summary Statement of Matter Involved.

This case was instituted by the Chickasaw Nation of Indians against the United States in the Court of Claims to re-

cover compensation for its alleged interest in the lands allotted to the Choctaw freedmen. The Chickasaw Nation filed its petition on August 5, 1929. The Choctaw Nation was made a party defendant by order of Court on January 2, 1940, the date the United States filed a petition in interpleader against the Choctaw Nation. On December 1, 1941 the Court of Claims held that the Chickasaw Nation was not entitled to recover against the defendant, the United States, and as to it, dismissed plaintiff's petition but rendered judgment against the Choctaw Nation, reserving for further proceedings the determination of the amount of recovery. On January 17th, 1942, the Choctaw Nation filed its motion for new trial, which the Court overruled on February 2, 1942.

By treaties between the United States and the Choctaw and Chickasaw Tribes of Indians, the latter owned large tracts of land in common in what is now Oklahoma, their respective interests being ¾ and ¼.

At the time of the Civil War, members of the Choctaw and Chickasaw Nations had a substantial slave population. In a treaty of April 28, 1866 (14 Stat. 769) between the United States and the Choctaw and Chickasaw Nations, the tribes agreed to abolish slavery.

By Article III of said treaty, the Government agreed to pay to the two Nations $300,000.00 for the cession of a portion of their land to the United States, but upon condition that their legislatures would, within two years, suitably provide for the investiture of certain rights, privileges, and immunities in the former slaves, who were called freedmen, and also for the allotment to each of such freedmen in severalty of 40 acres of the tribal land on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the latter had made their selections.

Failing the enactment of such legislation within two years, the $300,000.00 was to be forfeited and was to be used for the benefit of such of the freedmen as would remove from the tribal territory. It further provided that if these benefits were not conferred upon the freedmen, the United States would remove the freedmen.

This Article of the treaty was not complied with inside the two year period either by the Choctaw or Chickasaw Nations or the United States. (Finding IV, *Choctaw and Chickasaw Nations* v. *U. S.*, 81 C. Cls. 63, 68).

Article XXVI of said treaty provided that:

> "The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said Nations, or who may hereafter become such."

In 1880, the Choctaw Nation adopted legislation in the form of a memorial to the United States Congress in regard to the adoption of Choctaw freedmen into the Choctaw Nation as citizens thereof in accordance with Article III of said treaty of 1866, supra.

Complying with the wishes of the Choctaw Nation, Congress passed an act approved May 17th, 1882 (22 Stat. 68, 73), which provided that EITHER the Choctaw or Chickasaw Nation might, within a specified time, adopt and provide for the freedmen of said tribe in accodance with the terms of Article III of the treaty of 1866, supra, and that in such event certain money would be paid over to such tribe.

Thereafter the General Council of the Choctaw Nation, by legislative enactment approved May 21, 1883 (Laws Choctaw Nation, 1894, page 335) adopted into said tribe the freedmen and descendants thereof of said nation.

Pursuant to said Choctaw Freedmen Act and acts of Congress of the United States of June 28, 1898 (30 Stat. 495) and July 1, 1902 (32 Stat. 641) freedmen of the Choctaw

Nation were enrolled as freedmen citizens of said tribe and thereafter received allotments of 40 acres of land in severalty.

The Chickasaw Nation on January 10, 1873 enacted legislation adopting their freedmen in conformity with Article III of the 1866 treaty, supra, but Congress failed to approve it before a subsequent repeal by the Chickasaw Legislature, and the Chickasaw freedmen were never adopted into the Chickasaw Tribe and necessarily did not acquire the rights dependent upon adoption. *United States* v. *The Choctaw Nation, et al.*, 38 C. Cls. 558, 566-67, 193 U. S. 115.

But under treaty provisions and acts of Congress, the Chickasaw freedmen were given allotments of 40 acres of Choctaw and Chickasaw lands of average value to be used by them until their rights should be determined in such manner as thereafter provided by Congress. By the "Supplemental Agreement" of 1902, supra, it was provided that the question of such allotments to the Chickasaw freedmen should be determined by the Courts. This was done and a money judgment awarded to the Choctaw and Chickasaw Nations in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws for the value of the land allotted to the Chickasaw freedmen, but no such provision relating to Choctaw freedmen nor any like provisions appear in either the agreement of 1898 or that of 1902, supra.

The Court of Claims held that the arrangement of the Atoka Agreement whereby the Choctaw freedmen were to be furnished their allotments at the expense of the Choctaw Nation was incorporated into the Supplemental Agreement of 1902 as an obligation of the Choctaw Nation. Accordingly, the Court dismissed the Chickasaw Nation's petition against the United States and rendered judgment against the Choctaw Nation in favor of the Chickasaws, the deter-

mination of the amount of the recovery being reserved for further proceedings.

Treaties and Statutes Involved.

Treaty of April 28, 1866 (14 Stat. 769); Act of Congress of May 17, 1882 (22 Stat. 68); "Atoka Agreement", as amended the "Curtis Act", June 28, 1898 (30 Stat. 495); the "Supplemental Agreement", July 1, 1902 (32 Stat. 641), and the following acts of the General Council of the Choctaw Nation: "Memorial to Congress" of 1880 and the Choctaw Freedmen Adoption Act of May 21, 1883, (Laws Choctaw Nation 1894, page 335).

Questions Presented.

1. Whether the Chickasaw Nation of Indians is entitled to compensation for a one-fourth interest in the land allotted to the Choctaw freedmen, and

2. Whether, if they are entitled to such payment, the United States or the Choctaw Nation is liable.

Reasons Relied On for the Allowance of the Writ.

1. The decision of the Court of Claims in holding that the Chickasaw Nation objected to allotments of land to the Choctaw freedmen out of commonly owned lands and that the said freedmen should not be provided with land at the expense of the Chickasaw Nation, and the Choctaws, in the agreement negotiated at Atoka, Indian Territory, in 1897 assented to this position by agreeing that they should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen, is not borne out by the record, and is contrary to the applicable provision in the "Supplemental Agreement" of July 1, 1902 (32 Stat. 641),

which superseded and repealed the deduction provision in the Atoka Agreement.

2. The decision of the Court of Claims in holding that the Chickasaws' consent in the "Atoka Agreement", as amended by what is known as the Curtis Act of June 28, 1898 (30 Stat. 495) to allotments of land to Choctaw freedmen was given on expressed terms, and that at the time of the negotiations for the "Supplemental Agreement" in Washington, D. C., in February and March, 1902, the Chickasaws insisted that the agreement contain some provision saving their right not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands, and further concluding it was agreed that the proviso to section 40 of said agreement set out in Finding 8 of the Court's decision be included to protect their interest is not in accord with the record and applicable provisions of the "Supplemental Agreement" of July 1, 1902, supra.

3. The decision of the Court of claims in construing the provisions of the Treaty of April 28, 1866 (14 Stat. 769), the Atoka Agreement as amended and ratified by the two tribes and Act of Congress of June 28, 1898 (30 Stat. 495), and the further agreement made on March 2, 1902 between the United States and the two tribes, which was embodied in an Act of Congress on July 1, 1902 (32 Stat. 641) and ratified by the citizens of the two tribes are at variance with and contrary to the holding and rulings of the Secretary of the Interior, decisions of the Court of Claims and of this Court in so far as the Choctaw Freedmen are concerned. *United States* v. *Choctaw and Chickasaw Nations*, 38 C. Cls. 558, 193 U. S. 115; 81 C. Cls. 63 and 83 C. Cls. 140.

4. The decision of the Court of Claims in concluding that the primary obligation to the Chickasaw Nation for lands

allotted to Choctaw Freedmen is that of the Choctaw Nation instead of the United States is inconsistent and in conflict with the Treaty of April 28, 1866, (14 Stat. 769), provisions between the Choctaw and Chickasaw Nations and the United States, Acts of Congress, Act of the General Council of the Choctaw Nation and decisions of the Court of Claims and this Court. *United States* v. *Choctaw Nation, et al.*, 38 C. Cls. 558, 193 U. S. 115; 81 C. Cls. 63 and 83 C. Cls. 140.

5. The attorneys for the Choctaw Nation were without authority to file the application for an additional decree and such action by said attorneys did not create any liability against the Choctaw Nation.

6. This petition for writ of certiorari is presented under authority of the Jurisdictional Act of Congress of June 7, 1924 (43 Stat. 537) and Amended Rule 41 of the Revised Rules of this Court.

WHEREFORE, your petitioner respectfully prays that this Petition be granted to the end that this cause may be reviewed and determined by this Court; and that the judgment herein of said Court of Claims of the United States be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this the — day of April, 1942.

WILLIAM G. STIGLER,
Attorney for the Choctaw Nation.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1170

THE CHOCTAW NATION OF INDIANS,
Petitioner,

vs.

THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Court of Claims of the United States has not been officially reported but is incorporated in the transcript.

II.

Jurisdiction.

1. The date of the judgment sought to be reviewed is December 1, 1941.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is the act of June 7, 1924, (43 Stat. 537).

3. The petition for the writ is presented under Amended Rule 41 of the Revised Rules of this Court.

III.

Statement of the Case.

A statement of the case containing all that is material to consideration of the questions presented has been made in the petition for the writ herein and such statement is hereby adopted and made a part of this brief.

IV.

Specification of Errors to be Urged.

The Court of Claims erred:

1. In holding that the Chickasaw Nation objected to allotments of land to the Choctaw Freedmen out of the commonly owned lands and that the Choctaw Freedmen should not be provided with land at the expense of the Chickasaw Nation, and the Choctaws, in the agreement negotiated at Atoka, Indian Territory, in 1897 assented to this position by agreeing that they should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen.

2. In holding that the Chickasaws' consent in the "Atoka" agreement, as amended by the Curtis act of June 28, 1898 to allotments of land to Choctaw freedmen was given on expressed terms, and that at the time of the negotiations for the "Supplemental" agreement in Washington, D. C., in February and March, 1902, the Chickasaws insisted that the agreement contain some provision saving their right not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands, and further concluding it was agreed that the proviso

in section 40 of said agreement set out in Finding 8 of its opinion be included to protect their interest.

3. In construing the provisions of the treaty of April 28, 1866, between the Choctaws and Chickasaws and the United States, the agreement as ratified by act of Congress of June 28, 1898, supra, and the tribes, and the further agreement made on March 2, 1902 between the United States and the two tribes which was embodied in an act of Congress on July 1, 1902, supra, and ratified by the Citizens of the two tribes by vote.

4. In concluding and holding that the primary obligation to the Chickasaw Nation for lands allotted to the Choctaw freedmen is that of the Choctaw Nation instead of the United States.

5. In concluding that by the action of the attorneys for the Choctaw Nation in filing the application for an additional decree in the Chickasaw freedmen case, the Choctaw Nation desired to compensate the Chickasaws' for their contribution to the allotments of the Choctaw freedmen.

V.

ARGUMENT.

Summary of the Argument.

I.

The Chickasaw Nation consented to allotments to Choctaw freedmen by the treaty of April 28, 1866.

II.

The Chickasaw Nation consented to allotments to Choctaw freedmen by the Atoka and Supplemental Agreements.

(a) The provision in the Atoka Agreement for deduction of allotments to Choctaw freedmen by corresponding re-

ductions of the allotments of Choctaw Indian citizens, or by an adjustment or settlement otherwise was not reaffirmed by the Supplemental Agreement but was repealed.

III.

The consent of the Chickasaw Nation to allotments of land to Choctaw freedmen was not given on conditions or express terms and no saving clause, guaranty or proviso was inserted in the Atoka or Supplemental Agreements to insure them compensation for lands so allotted.

IV.

If the Chickasaw Nation is entitled to recover, any judgment rendered herein should be assessed against the United States and not the Choctaw Nation.

POINT I.

The Chickasaw Nation consented to allotments to Choctaw Freedmen by the Treaty of April 28, 1866.

The Chickasaw Nation in its brief in the Court of Claims in response to our motion for new trial and Brief in support thereof admitted that it consented to Choctaw Freedmen allotments but on "terms." This admission never came until the Court rendered its opinion herein and decided the consent was given on terms. In order to find out what the so-called "terms" are, it is absolutely necessary that we review the pertinent provisions of the Treaty of 1866, and acts of Congress of June 28, 1898 and July 1, 1902, supra.

In our summary statement of matter involved we recited in substance the applicable portions here of this Treaty. We, therefore, shall abstain from repetition and respectfully ask the Court to consider the pertinent portions of that statement under this heading.

We desire specifically, however, to invite the Court's attention to the provisions of Article XXVI of the Treaty of 1866, which reads as follows:

> "The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations or who may hereafter become such."

By this Article both the Choctaw and Chickasaw Nations gave their consent to the right to selection and allotment in severalty of the lands of said Indian Nations

> "to all persons who have become citizens by adoption or intermarriage of either of said Nations, or who may hereafter become such."

The words "all persons" used in the article could not be more inclusive. It will be observed that the article does not distinguish between those adopted within the two year period as provided by Article III of said Treaty and the subsequent adoption of single individuals, groups, or all freedmen en masse. This distinction is important as will be hereinafter shown.

May we further point out that the right here given under this article unquestionably was the right to select for allotment in severalty (Treaty of April 28, 1866, Articles XI-XXVI), and by this provision, the Chickasaw Nation undoubtedly agreed that any Choctaw freedmen who thereafter might become citizens by adoption were to have the same right as Choctaw and Chickasaw citizens to select allotments from lands belonging to the Nations.

Nowhere does it appear that this Article was ever repealed by any treaty or agreement between the parties thereto or by any act of Congress of the United States.

It is agreed by all that neither the Choctaw and Chickasaw Nations nor the United States complied with Article III

of said treaty within the two year period, but we wish to emphasize the fact that Congress by its act of May 17, 1883 provided that EITHER the Choctaw or Chickasaw Nation might ADOPT AND PROVIDE for their freedmen in accordance with the terms of Article III of the 1866 treaty and the provisions of Article XXVI. Pursuant thereto, the Choctaw Nation by a legislative enactment, adopted its freedmen. This they had a right to do under act of Congress. Since the Chickasaw Nation was a party to the treaty of 1866 and agreed by Article XXVI that any Choctaw freedmen who thereafter might become citizens by adoption had the right to select allotments from lands belonging to the two Nations, we respectfully submit that the Chickasaw Nation without any qualification or restrictions consented to allotments to the Choctaw freedmen under the treaty of 1866.

If the Chickasaws had not believed that freedmen could be adopted by either Nation and given commonly owned land without consent or compensation to the other, further than that given in the treaty of 1866, why did they in 1873 do precisely what the Choctaws did in 1883—enact legislation to adopt their freedmen in conformity with Article III of the treaty of 1866. Our Courts have held that the only reason this statute did not become effective was failure on the part of the Government to clearly approve it before a subsequent repeal by the Chickasaw legislature. *United States* v. *The Choctaw Nation, et al.*, 38 C. Cl. 558, 566-567, 193 U. S. 115.

We concur wholeheartedly in the language used by the able counsel for the Government in its brief before the Court of Claims when they said: "The members of the Chickasaw legislature in 1873 were only seven years removed from the date of the treaty of 1866, and were faced with the after effects of the Civil War and the emancipation

of negro slaves. They knew much better what was intended by that treaty than do their living descendants * * *."

Point II.

The Chickasaw Nation consented to allotments to Choctaw Freedmen by the Atoka and Supplemental Agreements.

a. *The Atoka Agreement.*

In the "Atoka" agreement of April 23, 1897, subsequently amended and incorporated in the Curtis Act of June 28, 1898, supra, and ratified by the citizens of the two tribes, the Chickasaw Nation plainly and unequivocally consented to the adoption of the Choctaw freedmen and to the allotments to each thereof of land equal in value to 40 acres of land, and since the reduction provision of this agreement, which the Chickasaw Nation contends was a guarantee that it would be compensated for ¼ of the lands allotted to Choctaw freedmen, was omitted from and was repealed by the Supplemental agreement of March 21, 1902 (32 Stat. 641), the Chickasaw Nation was not then or now entitled to any compensation for its common interest in the lands allotted to the Choctaw freedmen, by the reduction of the allotments of Choctaw Indian citizens or by an adjustment or settlement otherwise.

Congress in the Curtis Act authorized the Dawes Commission, which was established by act of Congress, May 3, 1893 (29 Stat. 612, 645), to enroll the freedmen of the Five Civilized Tribes in the following language:

> "It shall make a correct roll of all *Choctaw freedmen entitled to citizenship under the Treaties and Laws of the Choctaw Nation*, and all their descendants born to them since the date of the treaty. (Italics ours.)
>
> It shall make a correct roll of Chickasaw freedmen

> entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty; and forty acres of land, including their present residences and the improvements shall be allotted to each, to be selected, held, and used by them *until their rights under said treaty shall be determined* in such manner as shall be hereafter provided by Congress. (Italics ours.)

It will thus be seen that Congress distinctly recognized and understood at the time of the passage of the Curtis act that the Choctaw freedmen were entitled to citizenship under the treaties and the laws of the Choctaw Nation. On the other hand, it appears it was equally understood that the rights of the Chickasaw freedmen under the treaty of 1866 were of such doubtful nature, the matter required further consideration. But so far as the CHOCTAW FREEDMEN were concerned, they were directed by Congress to be and were enrolled without reservation and their rights created under the Treaty of 1866 were definitely recognized. If there had been any understanding to the contrary at that time in the minds of those who made this agreement, the Choctaw freedmen would have been put in the same category as the Chickasaw freedmen and therefore would have been included in the same provision as to the determination of their future rights. As to this, we think there can be no doubt. Since the reduction provision in the Atoka agreement, as amended by the Curtis act, was omitted and repealed by the Supplemental Agreement and the Choctaw freedmen were directed by Congress to be enrolled without reservation and their rights created under the treaty of 1866 were definitely recognized, why should the Chickasaw Nation receive any compensation for its common interest in the

lands allotted to the Choctaw freedmen. We fail to see any basis whatsoever.

b. *The Supplemental Agreement.*

On March 21, 1902, the Chickasaw Nation, the Choctaw Nation, and the United States entered into a new and further agreement, which became known as the "Supplemental" Agreement. It was approved and ratified by Congress on July 1, 1902, and by the citizens of the Choctaw and Chickasaw Nations by vote on September 25, 1902.

This agreement was more extensive than the Atoka Agreement and contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty to the members and freedmen of the two tribes, the sale of the residue of such lands after allotment had been made and equalized, and the reservation and sale or disposition otherwise of the common properties of the two tribes, and the distribution of all moneys arising therefrom. It provides, among other things:

> "Witnesseth that, in consideration of the mutual undertakings herein contained, it is agreed as follows:
>
> • • • • • • •
>
> "Sec. 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw Nations, AND TO EACH CHOCTAW AND CHICKASAW FREEDMAN, AS SOON AS PRACTICABLE AFTER THE APPROVAL BY THE SECRETARY OF THE INTERIOR OF HIS ENROLLMENT LAND EQUAL IN VALUE TO FORTY ACRES OF THE

AVERAGE ALLOTTABLE LAND OF THE CHOCTAW AND CHICKASAW NATIONS; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which lands may be selected by each allottee so as to include all improvements.

* * * * * * *

"Sec. 27. The rolls of the Choctaw and Chickasaw citizens and the Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898, and the act of Congress approved May 31, 1900 (31 Stats. 221) except as herein otherwise provided * * *.

"Sec. 38. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

We most earnestly submit that the explicit language of paragraph 11 of the Supplemental Agreement, makes it clear that the Chickasaw Nation again specifically agreed and consented to the allotment of lands to the Choctaw freedmen. We are unable to find any restriction or qualification on the consent and permission granted and agreed to in said paragraph 11 of the Supplemental agreement by the Chickasaws in respect of allotments to Choctaw freedmen. It therefore seems incredible that the Chickasaw Nation after a period of more than thirty-eight years, should now be permitted to set aside its unequivocal promise and consent concerning allotments to Choctaw freedmen.

The Court of Claims in its opinion in speaking with reference to the Choctaw Nation adopting legislation in which it adopted its freedmen after Congress in 1882 again offered a financial inducement in accordance with the terms of Article III of the treaty of 1866, said:

"The Choctaws adopted legislation to this end in 1883, but attached qualifications which may have prevented it from complying with the treaty of 1866. This legislation probably conferred political rights upon the Choctaw freedmen, but there is no showing that any land was permanently allotted to them."

May we respectfully say we think it is apparent that Congress did not think there were any disqualifications attached to the Choctaw Adoption Act, because the record shows the Choctaws were paid their proportionate share of the money allotted by the Government for this purpose and the Choctaw freedmen were later given allotments and went into possession of the same. We can think of no stronger proof than the fact that the Act was sufficient for the Choctaws to comply with said treaty. Surely, if it had been thought by Congress or anyone else in authority at that time that the Choctaw Adoption Act had such restrictive qualifications, our Government would not have taken the affirmative action it did.

If there is further doubt that the Choctaw freedmen were not lawfully adopted without any qualification and no guaranty was made to compensate the Chickasaws for the allotments made to them, let us examine the case of the *Choctaw and Chickasaw Nations* v. *United States*, decided March 4, 1935, 81 C. Cls. 63, wherein the two Indian nations sued the Government for $525,508.81 for unlawfully allotting 40 acres of land out of the Choctaw and Chickasaw common domain to each of the 466 minor Choctaw freedmen born between September 25, 1902, and March 4, 1906, and for the sum of $283,188.81 with interest for unlawfully selling certain land to Choctaw and Chickasaw freedmen. It was contended that such minor Choctaw Freedmen were without legal rights in such lands, because their Choctaw Freedmen parents were without legal rights. The Court

dismissed the complaint. In its opinion, the Court, speaking through Mr. Chief Justice Booth, unanimously said:

> "No contention is advanced that the freedmen of the Choctaw Nation were not adopted into the same. It is conceded that they were, and no claim is made in this case that the allotments made to both Choctaw and Chickasaw freedmen and their descendants living on September 25, 1902, were illegally made. The single controversy in the first cause of action is predicated upon an instance that the Choctaw and Chickasaw Reservation was held by the two Nations as tenants in common (the same contention made by plaintiff in this case. Parenthesis ours); that one tenant in common could not dispose of any specific portion of the estate without the consent of the other • • • "

Speaking further, the Court said:

> "It is our opinion that the case does not exact extended discussions. The findings set forth the admitted facts, and the contention of the plaintiffs we believe untenable.
>
> "The Chickasaw Nation joined in the Atoka Agreement of April 23, 1897 (finding X), subsequently ratified and incorporated in the Curtis Act of June 28, 1898 (finding V), and was likewise a party to the Supplemental Agreement of March 21, 1902 (finding XI).

It is true that the above case dealt with the rights of Choctaw minor freedmen to allotments of land from the common lands of the tribes and the allowance of freedmen preferential rights, but since it was contended that such minor Choctaw freedmen were without legal rights in such lands, because their Choctaw freedmen parents were without legal rights and the Court held to the contrary, this principle of law with reference to Choctaw freedmen parents is applicable here. Therefore, if the Chickasaws consented to the adoption of the Choctaw freedmen without any restric-

tions and allotments to them were lawfully made, why should the Choctaw Nation now be called upon to reimburse them for something to which they unquestionably gave their consent?

We also desire to call the Court's attention to the case of the *United States* v. *The Choctaw Nation, et al.*, decided April 27, 1903, 38 C. Cls. 558. The Court in speaking of the rights of the Chickasaw freedmen in the lands belonging to the Choctaw and Chickasaw Nations, said:

> "There is apparent reason to say that by the agreement and act of June 28, 1898 (30 Stat. L. 506), the previous act of Congress, by which the act of adoption was approved, WAS RATIFIED BY THE CHICKASAW NATION, wherein it was provided that the Commission shall make a correct roll of the freedmen entitled to any rights under the treaty in question, and that 40 acres of land, including their present residence and improvements, shall be allotted to each of them, and such lands so allotted to the freedmen to be deducted, so as to reduce the allotments to the Indians by the value of the same.
>
> "This allotment to the freedmen is, however, qualified by the further provision that the lands so allotted shall be held and used by the freedmen until their rights under the treaty shall be determined, in such manner as shall thereafter be provided by Congress.
>
> "This provision could not refer to anything but the then existing and now present controversy, and was a direct recognition by Congress of the denial of the rights of the freedmen to the lands then proposed to be allotted to them, and an express saving of the rights of the Chickasaw defendant to insist upon its present contention in that respect; and by act of Congress of March, 1902, did provide for the determination of the rights of the freedmen under the treaty. It follows, therefore, that the rights of the parties under Article 3 of the treaty of July 10, 1866, remain unaffected by subsequent legislation either of the Chickasaw Nation

or Congress, and the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw Nations under the third article of the treaty in question are to be determined and declared according to its terms."

Such was not true however with reference to the Choctaw freedmen. There was no saving clause or qualification or any further provision in any Treaty or act of Congress so far as they were concerned. If the Chickasaws objected, as they say they did, to the allotments of land being made to the Choctaw freedmen, why wasn't there a similar provision placed in the "Supplemental" Agreement with reference to them? Can there be any doubt but what the subject was discussed when it was agreed to insert the saving clause relative to the Chickasaw freedmen? We think not. Moreover, if the Chickasaw Nation had not thought it had already consented to the adoption of the Choctaw freedmen without any thought of compensation from the Choctaws, it stands to reason that the rights of the Choctaw freedmen to allotments of land would have been determined in the same manner and at the same time as was the Chickasaw freedmen.

It is impossible for us to believe that the Chickasaw Nation did not think it had consented to the adoption of the Choctaw freedmen and allotments of land to them, without any hope of future compensation, because in addition to the other evidence of record which we have presented, the Chickasaw Nation in its joint Reply Brief in No. F-181, *Choctaw and Chickasaw Nation* v. *The United States of America*, 81 C. Cls. 63, page 361, said:

"The whole controversy revolving about the status of the Choctaw freedmen could be said to have been closed and the final chapters written by the supple-

mental treaty of 1902, where provisions were made to give an allotment of average land equal in value to 40 acres to every ex-slave and his descendants born in all generations down to September 25, 1902, a period of 36 years after the treaty of 1866. BOTH NATIONS MAY HAVE ASSENTED TO THIS ACT OF GENEROSITY."

The Choctaw Nation can state its position in no language stronger than that employed by the Chickasaw Nation in the above quoted language. The able and learned counsel for the Chickasaws in the instant case was also counsel for the Chickasaw Nation in the above case and was on the brief. He was also connected with the Dawes Commission at the time the rolls were made of the Choctaws and Chickasaws and later his firm represented both the Choctaw and Chickasaw Nations at the same time. His wealth of experience and knowledge of the affairs of the Choctaw and Chickasaw Nations would never have permitted him to make such admission, had he not believed it to be true. We, therefore, believe the conclusion is inescapable that even counsel firmly believed that the Chickasaws consented to the Choctaw freedmen allotments without any restriction, saving clause or hope of future compensation; otherwise, such a statement would never have found its way into print.

(a). THE PROVISION IN THE ATOKA AGREEMENT FOR DEDUCTION OF ALLOTMENTS TO CHOCTAW FREEDMEN BY CORRESPONDING REDUCTIONS OF THE ALLOTMENTS OF CHOCTAW INDIAN CITIZENS, OF BY AN ADJUSTMENT OF SETTLEMENT, OTHERWISE WAS NOT RE-AFFIRMED BY THE SUPPLEMENTAL AGREEMENT BUT WAS REPEALED.

So far as the provision in the Atoka agreement for deduction of allotment is concerned, which is the so-called "guaranty" upon which the Chickasaw Nation places so

much emphasis, it was omitted in the "Supplemental" agreement and was thereby repealed.

In paragraph 68 of the Supplemental Agreement, it is provided:

> "No act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

In this, we find a stronger reason for asserting this deduction provision was repealed.

May we also point out that Congress in the Curtis Act definitely said that each Indian citizen should be allotted 320 acres of land. If the deduction provision had been allowed to prevail this could not possibly have happened, because the deduction provision is directly in conflict with what Congress said and would have caused a reduction from ALL the allotments. Inasmuch as these provisions are inconsistent, we repeat that by Section 68 of the Supplemental Agreement it was repealed.

Then too, no allotments of land to the Choctaw freedmen were ever made under the Atoka Agreement. The Court of Claims held in *Choctaw Nation* v. *United States, et al.*, 83 C. Cls. 140, 160, 164, that the allotments to the Choctaw citizens and freedmen were made under the provisions of the "Supplemental" Agreement and "superseded" the provisions of the "Atoka" Agreement.

This being true, we are unable to determine why the Court of Claims should be so concerned and give such emphasis and prominence to that part of its opinion which said:

> "in 1897 the United States Commission to the Five Civilized Tribes (The Dawes Commission) negotiated at Atoka, in the Indian Territory, a proposed agreement with the Choctaws and Chickasaws which pro-

vided that all tribal lands should be allotted to the Choctaws and Chickasaws, except that the Choctaw freedmen should each receive forty acres, and that the amounts of land so allotted to the Choctaw freedmen should be subtracted from the amounts which would otherwise have been allotted to the Choctaw Indians. By this arrangement the Choctaws would have been giving lands to their freedmen out of their own share, and the Chickasaws would have been making no contribution from their share of the lands."

The Court of Claims held that the "Supplemental" agreement had no provision analogous to the provision of the Atoka Agreement as negotiated at Atoka requiring the Choctaws to provide for their own freedmen by subtraction from their own allotment, nor to the provision of that agreement as enacted by Congress making the same requirement of both the Choctaws and Chickasaws. Therefore, we say it would make no difference even if the Choctaws, in the agreement negotiated at Atoka in 1897, which never became a law and could not, therefore, be binding, agreed that they should provide allotments to their freedmen at their own expense and by omitting any provisions at all for allotments to Chickasaw freedmen.

III.

The consent of the Chickasaw Nation to allotments of land to Choctaw Freedmen was not given on condition or express terms and no saving clause, guaranty or proviso was inserted in the Atoka or Supplemental Agreements to insure them compensation for lands so allotted.

The Court of Claims in its opinion held that the Chickasaws' consent in the Atoka agreement and the agreement of 1902 to the Choctaws' adopting their freedmen and providing them with land was given on terms,

Since the Supplemental agreement omitted the provision of the Atoka agreement for deduction of allotments to Choctaw freedmen by corresponding deduction of the allotments to the Choctaw Indian citizens, we are unable to agree with the Court that in the Atoka agreement the terms were that the Choctaws were to provide land for their own freedmen by subtraction from their own allotments. We submit that with its omission and repeal, it passed out of existence and could not possibly have the effect the Court gives it.

The Chickasaw Nation attempts to revive the defunct deduction proviso of the Atoka Agreement by asserting that it was "reaffirmed" by the Supplemental Agreement. To support this assertion it quotes section 40 of said agreement, which reads as follows:

> "Provided, that nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

The court in construing this proviso said among other things:

> "That if the proviso had related only to the allotments to Chickasaw freedmen it would have been natural for the language not to speak generally of 'allotments to freedmen' as it did, but to speak of 'allotments to said (or such) freedmen' or allotments to Chickasaw freedmen. Three times earlier in the same paragraph 'Chickasaw freedmen' are mentioned, and twice just before the proviso 'Chickasaw freedmen' are mentioned and twice just before the proviso 'said freedmen' are referred to. The mention in the proviso, in the alternative, of 'the money, if any, recovered aforesaid,' does not, we think make it certain

that the proviso was speaking only of the Chickasaw freedmen's allotments. It no doubt included them, but we think it also included the Choctaw allotments.

"* * * We have no doubt that the Choctaws understood the proviso as we have interpreted it."

We do not and cannot reach the same conclusion, since by its terms the proviso is confined strictly (1) to the dispute over allotments to Chickasaw freedmen and (2) to the rights of the two tribes as between themselves. What were the rights of the two tribes as between themselves? Obviously, it meant the rights of the respective nations in their proportionate, i. e., three-fourths and one-fourth, part of the funds that might be recovered through the courts.

As the Government so ably said in its brief:

"The proviso concerns itself only with the possible effect of 'this paragraph' but this 'paragraph' relates only to final allotments to Chickasaw freedmen, and to compensation for the value thereof, should it be determined that the Chickasaw freedmen, independently of the Supplemental agreement, had no right to allotments. Not a word in this paragraph relates to Choctaw freedmen; nor, indeed, is there a word in the entire subdivision of which this paragraph is a part (paragraph 36-40) which mentions Choctaw freedmen. This subdivision is grouped under the distinctive heading 'Chickasaw freedmen' and constitutes special jurisdictional legislation for the determination of the rights only of CHICKASAW FREEDMEN to allotments.

"The final words of the proviso, 'lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid,' conclusively tie the proviso to the preceding provisions of paragraph 40, which authorized allotments to the Chickasaw freedmen, and the payment of compensation in the event of judgment against the United States."

Therefore, if the Chickasaws are to recover for the lands allotted to the Choctaw freedmen, it must be upon some

ground independently of any provision of the "Supplemental" agreement, for the proviso itself expressly provides

> "that nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

We think it is indisputable that the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to the Choctaw and Chickasaw freedmen are fixed by Article III of the Treaty of 1866 in the proportion of three-fourths to the Choctaws and one-fourth to the Chickasaws.

The Court of Claims itself recognized the self-same status and rights of the two tribes in making its award in the *Chickasaw freedmen* case, 38 C. Cls. 558, to-wit: three-fourths to the Choctaws and one-fourth to the Chickasaws, as being the respective interests in the amount of the recovery therein. The Choctaws elected to adopt the Choctaw freedmen into the tribe and receive their three-fourths of the $300,000.00.

It is utterly impossible for us to see how the claim of the Chickasaws against the Choctaws can draw any comfort or support from any of the language of Section 40 of the "Supplemental" agreement or the proviso therein, as Section 40 of said agreement totally ignores any claim the Chickasaws may have on account of lands allotted to the Choctaw freedmen, in that it required whatever judgment might be rendered in the Chickasaw freedmen case should be in favor of the Choctaw and Chickasaw Nations according to their respective interests; and the proviso in Section 40 forbade that anything therein should be construed as affecting or changing such existing status or rights between the two tribes.

When we recall that the reduction provision of the "Atoka" agreement was repealed by the "Supplemental" agreement; that Section 68 of the "Supplemental" agreement provides:

> "No act of Congress or treaty provision, nor any provision of the Atoka agreement inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations,"

and Section 40 of the "Supplemental" agreement is confined strictly to the dispute over allotments to Chickasaw freedmen and totally ignores any claim the Chickasaws may ever have had on account of lands allotted to the Choctaw freedmen, and the Chickasaws gave their unqualified consent to said allotments on three different occasions, and by reason thereof is not entitled to any compensation, an adjustment or settlement otherwise, we respectfully insist that the Court of Claims was in error in concluding "that the consent there given was no consent to provisions for the Choctaw freedmen at the expense of the Chickasaw Nation."

Point IV.

If the Chickasaw Nation is entitled to recover, any judgment rendered herein should be assessed against the United States and not the Choctaw Nation.

If the Chickasaws are entitled to recover a one-fourth interest in the lands allotted to the Choctaw freedmen, they certainly are not entitled to recover it from the Choctaws, as the Choctaws received only their three-fourths share of the funds made available upon the adoption of the freedmen into the tribe, to which they were entitled, irrespective of the Chickasaws' one-fourth interest, as provided by

Article III of the Treaty of 1866. This basis for apportionment and payment of moneys arising out of the disposition of the common property of the Choctaw and Chickasaw Nations was first set forth in Article 10 of the Treaty of 1855 (11 Stat. 611), and re-stated and reaffirmed in the Treaty of 1866. *The Choctaw Nation* v. *The United States and the Chickasaw Nation of Indians*, 83 C. Cls. 140.

We believe it is wholly inconsistent for the court to require, as it did in the *Chickasaw freedmen* case, the Government to pay the two tribes for lands allotted to the Chickasaw freedmen and some thirty years later require the Choctaw Nation to pay the Chickasaw Nation for one-fourth of the value of the lands allotted to the Choctaw freedmen, when all the Choctaws ever received for the lands so allotted was three-fourths of the $300,000.00, as set forth in Article III of the Treaty of 1866. Under this state of facts, how can it be possible for the Choctaws to owe the Chickasaws now? We can not reconcile these two situations.

But there is a further and more compelling reason why if there is any liability here, and we do not admit there is, it is that of the United States and not that of the Choctaw Nation. If there were any guaranties contained in the Atoka or Supplemental agreements, to which the United States was a party, the matter of enforcement rested wholly in the hands of the United States.

As the Chickasaw Nation said in its brief in the Court of Claims:

> "The United States was the guardian and the Choctaw and Chickasaw Indians were its wards; and the duties and responsibilities of the United States, as such guardian, have been clearly defined by the Supreme Court of the United States in the case of the Choctaw Nation v. United States (119 U. S., 1-44, and other cases therein cited and quoted)."

We, therefore, submit, if anyone owes the Chickasaw Nation at all, it is the United States and not the Choctaw Nation.

The Court of Claims emphasizes the fact that the Choctaws through their attorneys on January 24, 1910, filed an "Application for Additional Decree" in the *Chickasaw freemen* case, 38 C. Cls. 558, 193 U. S. 115, stating that the Chickasaws were entitled to be paid for their proportionate one-fourth interest in the commonly owned lands allotted to the Choctaw freedmen and requesting the Court to enter a supplemental decree deducting the amount to which the Chickasaws would be thus entitled from the Choctaws' share of the said judgment.

There is no record evidence available, so far as we know, other than the application filed by the attorneys for the Choctaw Nation for the additional decree, that the Choctaws ever recognized the contention of the Chickasaw Nation that it should be compensated for the allotments made to the Choctaw freedmen. Certainly, if the Choctaw Nation wanted to consider and recognize such a claim it could have very easily caused money to be appropriated out of its tribal funds for such a purpose after the award was made by the court. But no such action was taken. We think, therefore, it must be considered that no merit was attached to the claim by the Choctaw Nation. Since no action was taken on the application by the court, the application is certainly not binding on the Choctaw Nation now.

We, therefore, submit that the action of the attorneys for the Choctaw Nation in the Chickasaw freedmen suit could not possibly bind the Choctaw Nation then or now.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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